The facts of *Krakauer's* case, *supra*, are these:

On June 19, 1941 the plaintiff issued a writ against the defendant claiming damages for breach of contract, or, alternatively, an account; the writ was served on the defendant and an appearance was entered on his behalf on July 25, 1941. The statement of claim ought to have been delivered in due time after entry of appearance; the plaintiff did nothing for over 12 years and in October, 1953, by his solicitor wrote to the defendant intimating that his claim was being revived and next month his solicitors gave notice by letter of their intention to proceed with action; the defendant went to the new solicitors, who gave notice of change and took out summons to dismiss the action for want of prosecution. The summons came before a master who took the view that after 12 years the action should be dismissed for want of prosecution; the plaintiff appealed to a judge who took the opposite view and said that the action was not to be dismissed. The Court of Appeal restored the decision of the master. But Denning L.J. at page 246 said:

"I am disposed to agree with what counsel for the defendant suggested, namely, that, by analogy with the Limitation Act, 1939, if a plaintiff allows an action to go to sleep for six years, the court in its discretion will usually dismiss the case for want of prosecution unless the plaintiff can show some good reason why he should be allowed to go with it. In this case, it is not six years, but twelve years, and I am quite clear that after this length of time the plaintiff ought not to be allowed to go on with the action. I think the appeal should be allowed, and the order of the master restored."

In this case it will be seen the one month's notice was given, but the court nonetheless dismissed the action because of very long delay. In the present case there is no long delay, but the plaintiff did not give the one month's notice before issuing the notice of trial. No reason has been given as to why the one month's notice could not have been given before the notice of trial was issued. Mr. Williams himself has agreed that the notice should have been given. I set aside the notice of trial.

Costs of the application to the applicants (defendants).

Order accordingly.

Solicitors: *Williams & Tennakoon; S. K. Lee & Co.*

LAU TIN SYE v. YUSUF BIN MUHAMMAD

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) August 10, 1973]
[Kuala Trengganu — Federal Court Civil Appeal No. 66 of 1972]

Tort — Occupier's duty to invitee — Person injured by blade of tractor on land — Whether occupier of land or owner of tractor liable — Negligence — Duty of care.

The respondent was injured when his right foot was cut by the blade of a tractor belonging to the appellant and which had been hired out to plough the land belonging to one Mustapha. The respondent was not an employee of the appellant but had been allowed to travel on the tractor. The respondent obtained judgment in the High Court and the appellant appealed.

Held: (1) there was no evidence to show that the tractor driver was guilty of a breach of a duty to take care;

(2) the rule in *Indermaur* v. *Dames*(1) could not apply to this case, as even assuming the respondent was an invitee, he was not injured as a result of any dangerous condition of the land.

Case referred to:

(1) *Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274, 287.

FEDERAL COURT.

Datuk H. L. Wrigglesworth for the appellant.

Datuk Wan Mustapha for the respondent.

Ali F.J. (reading the judgment of the court): This is an appeal from the judgment of the High Court at Kota Bharu, Kelantan.

The respondent, an adult male aged over 20 years, was injured when his right foot was cut by a tractor's blade. He sued the appellant, the owner of the tractor, and obtained judgment. Upon a finding of contributory negligence against him the award of damage was reduced to half. The appellant has appealed against the whole decision of the trial court but as nothing was said on the quantum either in the memorandum of appeal or in the arguments before us, this appeal will be treated as an appeal against the finding on liability.

The respondent's cause of action on the pleadings was for a breach of an employer's duty to provide a safe system of work. This is clear from paragraphs 1 and 3 of the statement of claim. Although paragraph 5 alleges negligence the particulars of negligence set out are not those which usually support a case of negligence. Any way the cause of action, so far as it was based on an employer's liability to provide a safe system of work, must have failed because on the evidence before him the learned trial judge said this:

"On the evidence before me I found that the plaintiff was not an employee of the defendant."

The evidence at the trial disclosed the following facts: On June 11, 1969 the appellant's tractor was hired out to plough land belonging to one Mustapha bin Deraman. The tractor was driven by Mohamed bin Said who was assisted by Abdullah bin Hassan or Pak Su Lah as he was described by the respondent. The respondent and a person named Zahari bin Ismail were also there having been allowed to travel on the tractor. While the tractor was at work, Abdullah signalled to the driver to stop. The tractor stopped but its engine was still running. This means that the tractor blade kept on rotating. According to the evidence Abdullah had stopped the tractor in order to adjust the blade cover which, he said, was too high. The respondent, thinking that Abdullah was having some difficulty in lifting the blade cover, went to assist him. He admitted that no one had asked him to do so. He described the accident in these words:

"As I was trying to lift the blade cover my right foot was cut by the hidden blade."

He maintained that he did not know that the blade was rotating. In answer to a question in cross-examination he said:

"I do not know that I had put my right foot further inside. I was wearing canvas shoes."

Whether or not he slipped is not clear from the evidence. That was all that he could say of the accident. Abdullah who gave evidence for the appellant had said

that he did not notice the respondent's presence until after the accident. He said:

"The tractor slowed down and I walked towards its rear. When tractor stopped I had reached its rear and I immediately lifted the cover of the cultivator to loosen the chain so as to lower the cover. As I was lifting the cover with my right hand and loosening the chain with my left hand I noticed the plaintiff was falling down to the ground to my right with his feet under the cover. I did not see him come there."

As for the tractor driver he too did not notice the respondent until after the accident. On the evidence, such as it was, the learned trial judge recorded his finding in these words:

"I find the driver negligent. I also find contributory negligence on part of plaintiff. I apportion liability on 50-50 basis. I assess the quantum at $7,000 on basis of full liability. In the event I give judgment for plaintiff in the sum of $3,500 and costs."

He made this finding on May 24, 1972. But in a written judgment dated July 16, 1972 he said, *inter alia:*

"As the rotating blade was some sort of unusual or even concealed danger of which DW.2 knew or ought to have known I found that defendant was liable for injuries sustained by the plaintiff as an invitee or even as a licensee. I was satisfied that negligence under paragraph (f) of the particulars of negligence had been established."

Paragraph (f) is in these terms:

"Causing or permitting the plaintiff to stand near the tractor in order to pull the tractor chain, when the tractor was in motion or operation when the defendant or his servant or agent knew or ought to have known it was unsafe and dangerous for defendant so to do."

Since neither Abdullah nor the tractor driver, Mohamed Said, had seen the respondent before the accident we fail to see how the paragraph can be said to have been established. At any rate the question is what is the real basis of the trial court's decision? Was it negligence or was it a breach of an occupier's duty to an invitee or a licensee? Without trying to answer this question, we shall proceed to consider whether on the facts either head of tortious liability has been established.

As for negligence there was not an iota of evidence to support a finding that the tractor driver was guilty of a breach of duty to exercise care. There is no doubt that the respondent had gone to assist Abdullah with the best of intentions. That, however, is beside the point. To succeed in his claim for damages he must prove negligence and this he failed to do.

As for breach of an occupier's duty to an invitee, the law is well stated in the judgment of Willes J. in *Indermaur* v. *Dames.*[1] While we have no quarrel with the trial judge's view that the respondent was an invitee we have some doubt whether at the material time the appellant was the occupier of the land. The owner of the land was Mustapha bin Deraman and the appellant was there as an independant contractor. However, this is not of great importance as the respondent was not injured as a result of any dangerous condition of the land. He was injured by the tractor's blade. The word "occupier" has been used in cases dealing with this principle of liability to describe a person who retains control over land, structures or premises. A person who lawfully enters upon such land, structures or premises is either an invitee or a licensee. In the instant case even assuming that the tractor was a structure it would be a misuse of the English language to say that on the facts the respondent had entered upon it. There may possibly be some other principle of liability which can govern the respondent's case but we are clearly of the view that the rule in *Indermaur* v. *Dames, supra,* cannot apply to this case.

We would allow this appeal with costs.

Appeal allowed.

Solicitors: *Wrigglesworth & Co.; Wan Mustapha & Co.*

TAN SWEE LAN v. ENGKU NIK BINTI ENGKU MUDA & ORS.

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) August 10, 1973]

[Kuala Trengganu — Federal Court Civil Appeal No. 16 of 1973]

Limitation — Action for specific performance of agreement for sale of land — Accrual of cause of action — When period of limitation begins to run — Whether material that claimant is not in possession of land — Limitation Ordinance, 1953, s. 9(1).

The appellant had claimed specific performance of an agreement for the sale of land. The agreement was made on April 12, 1958 and on March 2, 1970 the appellant wrote to the defendants claiming performance of the agreement. On March 16, 1970 the respondents replied that they were not taking steps to effect the transfer and they challenged the validity of the agreement. The writ was issued on April 16, 1970. The learned trial judge held that the action was statute barred. As the appellant was not in possession of the land he held that time ran from the date of the agreement.

Held: the period of limitation in this case ran from the date that the respondents threatened to infringe the appellant's right by saying that they refused to effect the transfer of the land. It was immaterial that the appellants were not in possession of the land. The defence of limitation failed and the appeal must be allowed.

Cases referred to:-

(1) *Bolo* v. *Kokland & Ors.* L.R. 57 I.A. 325; A.I.R. 1930 P.C. 270.

(2) *Ng Moh* v. *Tan Bok Kim & Anor.* [1969] 1 M.L.J. 46.

(3) *Nasri* v. *Mesah* [1971] 1 M.L.J. 32.

(4) *Halijah* v. *Morad & Ors.* [1972] 2 M.L.J. 166.

(5) *Williams* v. *Greatex* [1957] 1 W.L.R. 31.

FEDERAL COURT.

Lee Leng Guan for the appellant.

Dato Bijaya for the respondents.

Ali F.J. (reading the judgment of the court): We allowed this appeal on the date of hearing and, as indicated, we now give our reasons.

By a written agreement dated April 12, 1958, the respondents agreed to sell and the appellant agreed to buy a piece of land held under Grant 2483, Lot 2451 in the township of Kuala Trengganu. The agreed price was $3,600 of which $750 was paid by the appellant as down payment. The balance was to be paid when the land was transferred to the appellant. On the date of the agreement the land was part of the estate of the late Engku Muda bin Engku Besar and all the respondents were said to be beneficiaries of the estate.

On March 2, 1970, the appellant through his solicitor, wrote to the respondents reminding them of the